IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL APPLICATION (REVIEW) NO.2 OF 2004
IN
APPEAL UNDER ARBITRATION ACT NO.5/99

State of Goa,
represent by Executive Engineer,
Works Division V, Irrigation Department,
Now Water Resources Department,
Karapur Tisk, Sanquelim, Goa. ..... Applicant.

V/s.

Shri Vaikunth J. Naik,
Civil Contractor, House No.6210,
Camarshet, Near Dunlop Plot,
Curtorim, Salcete, Goa. ..... Respondent.

Mr. Guru Shirodkar, Addl. Govt. Advocate for the applicant.

Mr. S. G. Dessai, Senior Advocate with Mr. S. Kalshaunkar, Advocate for the respondent.

CORAM : P.V. KAKADE, J.

DATE : 15TH NOVEMBER, 2006.

ORAL JUDGMENT :

Heard learned Counsel for both the parties. Perused the record.

2. This is a review application preferred by the State-applicant

seeking review of the order passed by the learned Single Judge on 21.11.2003 in Appeal Under Arbitration Act No.5/1999, whereby it was held, for the reasons recorded therein, that the appeal partly succeeded and the award as well as the decree stood modified only to the limited extent of rate of interest for the pre-reference period i.e. from 31.3.1989 till 30.4.1994 which was the first date of hearing of the arbitration proceedings and rest of the award and the decree passed by the Court below remained as it was.

3. With the help of both the learned Counsel, I have gone through the entire record. The learned Senior Counsel for the respondent initially raised the objection regarding maintainability of the review petition on the ground that by virtue of Section 41 of the Arbitration Act, 1940, the provisions of Civil Procedure Code were not applicable to the Special Act i.e. the Arbitration Act, 1940 and submitted that the review application was not maintainable. However, my attention was also drawn by the learned Counsel for the applicant to the ruling of the Apex Court in the case of ***Union of India and ors. vs. Aradhana Trading Co. and ors.,*** (2002) 4 SCC 447, the ratio of which would indicate that since it was an order passed in appeal under Section 39(1) of the Arbitration Act, 1940, the provisions of Civil Procedure Code would apply under Section 41 of the

said Act and as such, the revision petition appears initially maintainable.

4. Turning to the merits of the matter, the only exception appears to have been taken to the Judgment and Order passed by this Court is to the amount awarded under clause 10(CC) of the contract between the parties. It was submitted that the said amount was restricted for the initial period at 85 % and for the remaining period at 100 % which was an error apparent on the face of Judgment as it was beyond the contract. However, this appears to be misconception in the sense that the learned Single has himself clarified the position in paragraphs 13 and 14 of his order. After quoting paragraphs 18 and 19 of the claim petition, it was observed that the respondent had claimed quantum of 85 % of the work executed during the period between 20.12.1985 till 14.12.1986 as was provided by clause 10(CC) of the principal agreement. Insofar as the subsequent period from 15th December, 1986 to 20th March, 1989, the respondent claimed escalation at 100 % of the amount of work executed being sum of Rs.1,25,906.46 for such claim was not specifically restricted by clause 10(CC) of the agreement and that the respondent was entitled to set up that claim in terms of clause 25 of the agreement. In other words, it was contended that in so far as period between December, 1985 to December, 1986 was concerned, that being governed by the principal

agreement, the claim for escalation was restricted in terms of clause 10 (CC) of the agreement; whereas for subsequent period from December, 1986 to March, 1989 since that was outside the contract period and there being no restriction in the agreement, the respondent was entitled to claim at the rate of 100 % in terms of the general law.

5. It was the view also taken by the learned Single Judge that this objection was taken in response to the claim set up by the respondent for the first time and, if that be so, it was not open to the appellant to agitate that aspect for the first time before the learned Single Judge as that question ought to have been put in issue before the arbitrator in the first instance and as it was not done, that could not be the basis for interfering with the award. This is the reasoning adopted by the learned Single Judge and I do not see any reason to disturb the view taken in review jurisdiction of this Court. At any rate, this is not a fit case to interfere with by virtue of the provision of Order 47 of the C.P. Code.

6. Under the circumstances, I do not see any merit in the review application and, therefore, the application stands dismissed with no order as to costs.

P.V. KAKADE, J.

ssm.